(CAPITAL CASE)

No. 18-100

In the
Supreme Court of the United States

LEONARD MAURICE DRANE,

PETITIONER,

v.

ERIC SELLERS, WARDEN, GEORGIA DIAGNOSTIC AND CLASSIFICATION PRISON,

RESPONDENT.

On Petition for a Writ of Certiorari to the Georgia Supreme Court

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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REPLY BRIEF

Nowhere does Respondent's Brief in Opposition ("Opposition" or "BIO") deny the most critical fact before this Court. With David Willis's confession, the only two witnesses to the death of Renee Blackmon—Mr. Willis and Petitioner Leonard Drane—now give the same account of what happened that night: specifically, that Mr. Willis and Mr. Willis alone shot Ms. Blackmon, and Mr. Willis and Mr. Willis alone cut Ms. Blackmon. Nor does anything in Respondent's Opposition avoid the unavoidable fact that if Mr. Willis had joined Petitioner in telling the truth at the time of their arrest, it is inconceivable the State would even have charged Petitioner with murder, let alone that a jury would have convicted him for that murder and sentenced him to death.

Respondent nonetheless brushes Mr. Willis's confession aside, continuing to assert that Petitioner's continued incarceration on death row for a crime he did not commit is lawful. Respondent has consistently—and, to this point, successfully—erected procedural obstacles to a determination on the merits of Petitioner's actual innocence claim, and he remains willing to rely on those obstacles to condemn to death a person who unquestionably did not commit the murder for which he was convicted. Respondent's latest argument suggests that this Court is precluded from considering Petitioner's habeas claim of actual innocence because the state courts found below that their denial of his earlier extraordinary motion for new trial ("EMNT") renders that claim res judicata. Respondent claims that this res judicata finding is an adequate and independent

state law ground that bars this Court's jurisdiction. As explained below, that is not even the question presented by this petition for certiorari. Even if it was, per Respondent's own arguments, the res judicata finding is neither independent nor adequate and, accordingly, cannot deprive this Court of jurisdiction over Mr. Drane's innocence claim. "The execution of a person who can show that he is innocent comes perilously close to simple murder." *Herrera v. Collins*, 506 U.S. 390, 446 (1993) (Blackmun, J., joined by Stevens, J., and Souter, J., dissenting). This is the circumstance Respondent invites, and this is the circumstance that only this Court can now avoid.

I. The State Court's Finding that Actual Innocence is Not Cognizable Under State Law Does not Foreclose Relief Here.

Respondent leads his opposition with the argument that Georgia law does not authorize habeas relief to consider actual innocence and that hearing Petitioner's claim will "force Georgia, and by consequence every other state, to make cognizable in state habeas proceedings a freestanding actual innocence claim." BIO at 15. This misapprehends Petitioner's argument. Petitioner seeks certiorari review here based on the alleged violation of his federal constitutional rights. The Georgia Supreme Court's determination that Georgia state law does not recognize innocence as independently cognizable does not even begin to address Petitioner's claim under the United States Constitution.

Petitioner respectfully submits that the Georgia Supreme Court's conclusion that actual innocence is not cognizable as a matter of state law does not reconcile with the very statute the Respondent cites, which suggests that the issue is not so clear.[1] But that does not matter here. Petitioner did not plead, and the Georgia Supreme Court did not reject, a claim based merely on Georgia law. Petitioner pled a violation of *his federal constitutional rights*, and this petition for review in this Court is based on Petitioner's contention that the Georgia Supreme Court improperly rejected this claim. As to this claim, the State correctly does not dispute what this Court previously held in *Herrera*: "[I]n a capital case

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[1] As Respondent acknowledges, Ga. Stat. Ann. § 9-14-48(d), which authorizes habeas relief to avoid a "miscarriage of justice," turns directly on "evidence of actual innocence." BIO at 14; Pet. App. 22–23. In *Perkins v. Hall*, 288 Ga. 810, 826 (2011), the Supreme Court of Georgia suggested "we are aware of no case in which this Court (or any other appellate court) has extended the 'miscarriage of justice' exception *beyond claims that a defendant is actually innocent* to claims involving trial rights, no matter how important those rights may be." In explaining the "miscarriage of justice" exception in *Valenzuela v. Newsome*, 253 Ga. 793, 796 (1985), the Court noted that "we must not . . . forget the core purpose of the writ—which is to free the innocent wrongfully deprived of their liberty." It is not clear that this "miscarriage of justice" exception would not apply to Petitioner's innocence claim and require review. Indeed, the federal courts also recognize a "miscarriage of justice" standard, although most often as a "gateway" to pursue claims that might otherwise be procedurally barred. *See Schlup v. Delo*, 513 U.S. 298 (1995), explaining that to establish a miscarriage of justice exception, petitioner is required to support allegations of constitutional error with new reliable evidence that was not presented at trial, which Petitioner clearly presented here.

a truly persuasive demonstration of 'actual innocence' made after trial would render the execution of a defendant unconstitutional and warrant federal habeas relief *if there were no state avenue open to process such a claim*." *Herrera*, 506 U.S. at 420 (emphasis added). This is precisely such a compelling case of innocence. Accordingly, the state court's adjudication that Mr. Drane's actual innocence claim is not cognizable under state law not only fails to *foreclose* this Court's review of his claim, but also creates the circumstances which *require* that review.

II. The State Courts' Adjudications of Petitioner's EMNT Cannot Foreclose This Court's Consideration of His Innocence Claim

But Respondent goes beyond misapprehending Petitioner's argument. He appears to suggest that this Court has no jurisdiction over the federal question that Mr. Drane's innocence claim invokes because the Supreme Court of Georgia's adjudication of his earlier EMNT renders that claim res judicata. This is not what the Supreme Court of Georgia appears to hold in its elliptical order. In denying Mr. Drane's CPC application below, it purported to address his innocence claim only as a matter of state law. It did not even mention the federal question invoked by his claim. To the extent that this constitutes a ruling limited to the state constitutional rights invoked by Mr. Drane, it does not limit this Court's review of the federal question. To the extent that this constituted an attempt by the state court to resolve this claim on a state-law ground that would

insulate its denial from review, its reliance upon its EMNT adjudication as res judicata for a claim of innocence defeats that purpose, as it is not an independent and adequate ground to reject further consideration of this claim.

A. The EMNT Adjudication Is No Procedural Bar

As Respondent acknowledges, in order for the state court's finding of res judicata to prevent this Court's consideration of Mr. Drane's innocence claim, it would have to provide an adequate and independent state law ground so as to preclude jurisdiction over the "federal claim." BIO at 21. It fits neither criterion.

First, it is not independent, for reasons that this Court explored in its decision in the recent Georgia case of *Foster v. Chatman*, in which Respondent also sought to rely upon res judicata to deprive this Court of jurisdiction. 136 S. Ct. 1737, 1746 (2016). If the state courts' "application of a state law bar 'depends on a federal constitutional ruling, the state-law prong of the court's holding is not independent of federal law, and [this Court's] jurisdiction is not precluded.'" *Foster*, 136 S. Ct. at 1746 (quoting *Ake v. Oklahoma,* 470 U.S. 68, 75 (1985)) (also citing *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Engineering, P.C.,* 467 U.S. 138, 152 (1984)). Accordingly, to the extent that Respondent asserts that the state courts' adjudication of the materiality prong of Petitioner's EMNT constitutes an adjudication of his innocence claim, he has, by virtue of making that argument, removed res judicata as a procedural bar. To the degree that the state courts

claim that they addressed the federal rights acknowledged by *Herrera* in that adjudication, then their "application of res judicata . . . was not independent of the merits of his federal constitutional challenge . . . [and] poses no impediment" to this Court's review of his actual innocence claim. *Foster*, 136 S. Ct. at 1746–47; *see also Ake*, 470 U.S. at 75. While Respondent elsewhere argues that the state court's reliance upon the procedural bar does not "involve an examination of Drane's actual innocence claim," BIO at 23, it must, for the state court could not have concluded, as Respondent argues, that its earlier analysis of the *Timberlake* factors were sufficient to address Petitioner's actual innocence claim without conducting that examination. *Foster* shows as much. Further, the state court admits it, stating that Petitioner has "litigated *his actual innocence claim* in his original trial court through an extraordinary motion for new trial[.]" CPC Denial at 2 (emphasis added).

Nor is res judicata an "adequate" ground under these circumstances. As Respondent notes in his Opposition, res judicata in Georgia prevents only "the relitigation of all claims which have already been adjudicated between the same parties on identical causes of action." BIO at 21 (internal quotations omitted) (citing *Odom v. Odom*, 291 Ga. 811, 812 (2012)). Even setting aside the question of whether the parties in this matter are the same, the question of whether Petitioner can meet the six-part, court-made, and largely procedural EMNT standard promulgated by *Timberlake* is not "identical" to the question of whether Petitioner can make the

persuasive showing of actual innocence anticipated by this Court in *Herrera*. As the Georgia Supreme Court decided in *Odom*, for res judicata to apply, the claims must in fact be *identical*. Thus, the terms of a divorce decree were not res judicata such that an action to modify child support was barred. *See Waldroup v. Greene County Hosp. Auth.*, 265 Ga. 864, 865 (1995) (discussing interplay of collateral estoppel and res judicata in related but separate actions for personal injury and wrongful death). Even *Timberlake*'s materiality prong is not "identical" by this standard.

Further, as Petitioner noted in his petition, the Georgia Supreme Court's application of *Timberlake* to his EMNT was inconsistent with its stated approach of focusing upon the "core question" of materiality when dealing with evidence of innocence in capital cases. Petition at 29 (citing *Davis v. State*, 283 Ga. 438, 447 (2008)). As a state law must be "strictly or regularly followed" by the courts of the in order to serve as a procedural bar, the state court's adjudication of Petitioner's EMNT fails for this reason as well. *Hathorn v. Lovorn*, 457 U.S. 255, 262–63 (1982) (quoting *Barr v. City of Columbia*, 378 U.S. 146, 149 (1964) ("'State courts may not avoid deciding federal issues by invoking procedural rules that they do not apply evenhandedly to all similar cases'")).

B. The Emergency Motion for New Trial Did Not Provide a Full and Fair Determination of Petitioner's Actual Innocence

Respondent asserts that Petitioner "has not made a persuasive showing of actual innocence" because the state courts concluded that he could not meet *Timberlake*'s materiality standard, which asks whether the new evidence would probably produce a different verdict. BIO at 17. But Respondent elsewhere asserts that Petitioner's "real request is for this Court to engage in error correction of the state court's decision denying his extraordinary motion for new trial, which is disapproved by this Court's own rules." BIO at 24. These irreconcilable positions illustrate Respondent's shell game. Petitioner seeks this Court's review of his habeas claim of actual innocence. The state court's decision as to his EMNT has entered the picture only because that court and Respondent now cite it as dispositive of his innocence claim—a conclusion that obliges Respondent to grapple with that decision's unsuitability as a prior adjudication of his innocence and the unreasonableness of its factual and legal conclusions. Respondent cannot argue that the state court's findings of fact and conclusions of law as to his EMNT are both dispositive of his claim and beyond the purview of this Court's review.

While the petition fully and adequately addresses the shortcomings in the state courts' adjudications of *Timberlake*'s materiality prong, Respondent, in defending the state courts' decisions, repeats their errors. Respondent particularly

overrates the evidence presented against Petitioner at trial while underrating the impact of Mr. Willis's confession. While Respondent summarizes the testimony of those state witnesses who attributed inculpatory statements to Petitioner, he does not address the contradictions within those statements, which cannot be reconciled with the facts of the crime or with each other, as detailed in the petition. Petition at 31–34. More critically, Respondent fails to recognize that Mr. Willis's sworn confession would have simply overwhelmed any testimony from those witnesses. Petitioner still contends that he would never have been charged with capital murder if Mr. Willis had admitted his sole responsibility at the time of their arrest. If the State had proceeded, however, and called each of the flawed and contradictory witnesses it presented at Petitioner's trial, that testimony would have been obliterated by Mr. Willis's lurid account of his thoughts and actions in murdering Ms. Blackmon and his resolute acceptance of sole responsibility. Even if the jury had fully credited the state's witnesses—which would require believing that Mr. Drane said each of the quite different things they attributed to him—it could not have convicted him of murder unless it concluded that those inconsistent statements erased any reasonable doubt as to Mr. Drane's guilt, even in the face of Mr. Willis's sworn confession. Respondent accuses Mr. Drane of "myopic reliance on Willis' statements." BIO at 19. Mr. Drane respectfully submits that it is Respondent, and not he, who is not seeing that evidence clearly.

Respondent also claims that the statements of Petitioner and Mr. Willis have "contradictions"

because Petitioner, in one of his "initial statements to law enforcement, speculated that Mr. Willis killed Ms. Blackmon "because of her race," while Mr. Willis would later explain that he murdered her "because he mistakenly thought she was going to kill him." BIO at 18, n.7 (citing Trial Tr. at 1694). But this is not a contradiction. Both Mr. Willis and Petitioner have explained that Mr. Willis killed Ms. Blackmon abruptly and without giving an explanation. Petitioner's speculation as to what motivated Mr. Willis is immaterial. What matters—indeed, the only thing that matters—is that Petitioner and Mr. Willis agree that Mr. Willis alone shot Ms. Blackmon in the head and cut her throat.

Respondent's invocation of the EMNT adjudication also highlights the issue of whether this Court is willing for an innocent man to remain on death row based upon state court adjudications that relied upon distorted fact-findings and erroneous applications of state law to effectively shunt aside the question of Petitioner's innocence. For example, the state trial court determination of the EMNT turned on the remarkable assertion that the Willis confession after 20 years of dedicated silence somehow was not "new evidence." In so concluding, the state trial court confused the *evidence* itself—Willis's confession—with the *fact* that Petitioner was innocent, asserting that "the evidence that Willis was the only one to kill Ms. Blackmon was known by Drane since he was taken into custody, and is in fact evidence from which Drane 'has never wavered.'" Pet. App. 40. There is, of course, no question that Petitioner has always known that he did not kill Ms. Blackmon. But that knowledge is not evidence. And

his insistence upon his innocence is in no way equivalent evidence to the unqualified admission of the actual murderer. Not even close.

Similarly, the state trial court's summary conclusion that the evidence of Willis's confession "does not rise to the level of being so material that the Court feels there probably could have been a different verdict" is both unexplained and inexplicable. Stated simply, there could be no evidence more "material" to the issue of Petitioner's innocence than the sworn confession, at great cost to himself, of the person who actually committed the crime, particularly when that statement is consistent with the account Petitioner himself has given since the time of his arrest.

Finally, the suggestion that the state trial court rejected Petitioner's claim of innocence on the merits cannot be squared with its opinion. The court recognized that "there is precedent for the proposition that only the person who commits the murder is constitutionally eligible for the death penalty, *Enmund v. Florida*, 458 U.S. 782 (1982)" (Pet. App. 42), and it referred that question to the habeas court for further consideration. While the trial court erroneously concluded that it could not grant relief as to Petitioner's sentence, it expressly recognized that "the Court hearing the Habeas Corpus petition" might be the appropriate forum to resolve the issue." *Id.* A decision concluding that Mr. Willis's confession establishes that Petitioner did not "commit[] the murder" and expressly referring the question to the state habeas court, while simultaneously finding the confession not material, is

simply too contradictory to foreclose any inquiry into the question of Petitioner's innocence.

Indeed, as Mr. Drane discusses extensively in the petition, pp. 27–36, he respectfully submits that the Georgia Supreme Court's decision affirming the denial of the EMNT in no way constituted an adjudication of Petitioner's claim of actual innocence. The Georgia Supreme Court reviewed the trial court's denial of the EMNT for *abuse of discretion*. *Drane v. State*, 291 Ga. 298, 303 (2012). In that highly deferential posture, the Court suggesting that there was other evidence in the record (albeit none of it from eyewitnesses) that raised an issue as to the extent of Petitioner's involvement,[2] and engaged in conjecture about whether it is possible that Willis might have had an ulterior motive to accept responsibility for the murder, despite the absence of any evidence of any such motive.[3] Nowhere did the Georgia Supreme Court find that Willis's sworn confession that he acted alone in killing Ms. Blackmon was not credible; and any such finding would not have been supported by the record before it. The Court neither addressed nor concluded whether Petitioner was actually innocent. Nor can

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[2] Petitioner discussed this contradictory and questionable evidence in detail in the petition. Petition, pp. 30–34.

[3] The Supreme Court relied on its "own observation from the evidence" that Drane and Willis were close friends and that they had agreed before their apprehension to work in concert to protect one another from prosecution," 291 Ga. at 303, but ignores that once apprehended Petitioner consistently contended that Willis had committed the crime while Willis remained silent for 20 years.

the patchwork quilt of speculation that it assembled in finding no abuse of discretion be recast as analysis of that claim.

As noted *supra*, the EMNT is not an identical claim to the habeas petition, and the resolution of that motion on procedural grounds did not bar the habeas claim. In the final analysis, even if the state of Georgia is entitled to erect exacting procedural burdens and standards of review on a motion for new trial in state court and were entitled to enforce those burdens to deny a new trial, it cannot, in doing so, transform a procedural determination on such a motion into an adjudication on the merits of Petitioner's habeas claim of actual innocence. And even if the Georgia courts apply the doctrine of res judicata in such an improper manner, it cannot deprive Petitioner of his federal constitutional rights to a determination of his actual innocence.

C. Petitioner's Actual Innocence Claim Was Never Decided in the State Habeas Corpus Proceedings

Beyond and in spite of its reliance upon the EMNT decision to assert res judicata, Respondent also contends that his innocence claim was fully vetted by the habeas proceedings below. It was not. Respondent does not contest that Petitioner raised his claim of actual innocence in his original habeas petition and in amendments to that petition. Likewise, Respondent does not contend that any state court ever decided this claim on the merits. Nor could he, as this claim was not addressed in the original state court decision denying habeas relief, or

in the Georgia Supreme Court's first decision remanding the case for further proceedings in the state court. And there is no dispute that, while the state habeas court on remand both authorized discovery and heard the evidence supporting Petitioner's claim of actual innocence, it ultimately concluded that it had no jurisdiction to consider the claim. As that Court explained, "[w]hile Willis' confession would certainly have been relevant to several issues raised in Drane's original habeas petition and the amendments thereto, it is simply not relevant to the two specific issues on remand. As such, this Court is without the authority to consider this claim." Pet. App. 7.

Following the state habeas court's refusal to consider these questions, the Supreme Court declined to grant Petitioner's application for a certificate of probable cause to appeal. Pet. App. 20. While the Court found that Drane's actual innocence claim based on Willis testimony "falls short of establishing a miscarriage of justice exception to overcome the procedural bar to this claim," Pet. App. 23, but in doing so conveniently ignores the fact that the state habeas court had not fully considered or evaluated the evidence before it or assessed the credibility of Willis. In short, the Court simply characterized the evidence as insufficient without any meaningful analysis, and refused to allow an appeal to consider the issue fully.

CONCLUSION

At a minimum, Petitioner is constitutionally entitled to a full and fair hearing and evaluation of his claim of actual innocence. Because no Georgia court provided that forum, this Court should grant the petition.

Respectfully submitted,

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